for the order to be made, nor, of course, do I impute any impropriety on the part of the President of the Sessions Court in making it.

The order must be set aside and, in substitution for it, there shall be an order of this Court that the appellant be discharged and acquitted.

Order set aside.

Appellant discharged and acquitted.

MOHAMAD KASSAN BIN HASSAN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Whitton, Ag. J.) October 25, 1950]

[Seremban — Criminal Appeal No. 25 of 1950]

Penal Code, s. 403 — Criminal Procedure Code, s. 174 — Alteration of charges at close of prosecution case — Admissibility of evidence — Whether improper admission of evidence has occasioned a failure of justice — Whether re-trial should be ordered — Criminal Procedure Code, s. 428.

In this case the appellant was originally charged with the following charges :—

"(1) That you between 15th May, 1949 and 23rd February, 1950 at Messrs. Guan Hoe & Co., Ltd. petrol pumping station, No. C, Fort Road, Malacca, dishonestly misappropriated to your own use certain movable property to wit petrol thus committing an offence punishable under section 403 of the Penal Code;

(2) That you between 2nd June, 1949 and 3rd February, 1950 at Malacca, cheated the Department of Public Relations of the Federation of Malaya by submitting various returns setting out that certain petrol had been used in Motor Vehicle No. B 5846 whereas it had been used in motor car No. BA 2910, with the knowledge that you were likely thereby to cause wrongful loss to a person to wit the aforesaid Department, whose interest in the transaction you were bound by law to protect thus committing an offence under section 418 of the Penal Code;

(3) That you between 15th May, 1949 and 23rd February, 1950 at Messrs. Guan Hoe & Co., Ltd. petrol pumping station at No. C, Fort Road, Malacca, abetted the offence of failing by Guan Hoe & Co., Ltd. to observe the first condition attached to a Retailer's Licence issued to him on the 18th October 1947 under the Fuel and Lubricants Control Proclamation No. 41, by requesting that company to deliver petrol into the tank of motor car No. BA 2910 whereas Authorisation Notes were presented with respect to motor vehicle No. B 5846, which offence was committed in consequence of the abetment, thus committing an offence unler section 109 of the Penal Code and section 4 of the Fuel and Lubricants Control Proclamation, and punishable under section 19 of the aforesaid Proclamation."

At the close of the prosecution the learned President of the Sessions Court held that the charges were bad for multiplicity and he amended the charges as follows :—

"(1) That you on or about the 16th day of May 1949 at Messrs. Guan Hoe & Co., Ltd. petrol pumping station, No. C, Fort Road, Malacca, dishonestly misappropriated certain movable property to wit one gallon of petrol belonging to Department of Public Relations of the Federation of Malaya and thereby committed an offence punishable under section 403 of the Penal Code;

(2) That you on or about the 20th day of May 1949 at Messrs. Guan Hoe & Co., Ltd. petrol pumping station, No. C, Fort Road, Malacca, dishonestly misappropriated certain movable property to wit one gallon of petrol belonging to Department of Public Relations of the Federation of Malaya and thereby committed an offence punishable under section 403 of the Penal Code;

(3) That you on or about the 21st day of May 1949 at Messrs. Guan Hoe & Co., Ltd. petrol pumping station, No. C, Fort Road, Malacca, dishonestly misappropriated certain movable property to wit two gallons of petrol belonging to Department of Public Relations of the Federation of Malaya and thereby committed an offence punishable under section 403 of the Penal Code."

The appellant was convicted on the amended charges.

Held, (1) that some of the evidence which had been brought against the appellant on the original charges, dealing with events before May 1949 were inadmissible on the amended charges which related only to the month of May 1949; (2) that in the circumstances of the case the improper admission of evidence had caused a failure of justice; (3) that on the facts of the case it was inequitable to order a re-trial and therefore the convictions must be quashed.

CRIMINAL APPEAL from Sessions Court, Malacca.

A. J. Bostock-Hill (*C. S. Jayaswal* with him) for the appellant.

Tungku Abdul Rahman (D.P.P.) for the respondent.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Whitton, Ag. J. : —The appellant in this case was convicted by the President of the Sessions Court, Malacca, on three charges under section 403 Penal Code, and was sentenced to six months' rigorous imprisonment on each charge, sentences to run concurrently. The charges read as follows :—

"(1) That you on or about the 16th day of May 1949 at Messrs. Guan Hoe & Co., Ltd. petrol pumping station, No. C, Fort Road, Malacca, dishonestly misappropriated certain movable property to wit one gallon of petrol belonging to Department of Public Relations of the Federation of Malaya and thereby committed an offence punishable under section 403 of the Penal Code;

(2) That you on or about the 20th day of May 1949 at Messrs. Guan Hoe & Co., Ltd. petrol pumping station, No. C, Fort Road, Malacca, dishonestly misappropriated certain movable property to wit one gallon of petrol belonging to Department of Public Relations of the Federation of Malaya and thereby committed an offence punishable under section 403 of the Penal Code;

(3) That you on or about the 21st day of May 1949 at Messrs. Guan Hoe & Co., Ltd. petrol pumping station, No. C, Fort Road, Malacca, dishonestly misappropriated certain movable property to wit two gallons of petrol belonging to Department of Public Relations of the Federation of Malaya and thereby committed an offence punishable under section 403 of the Penal Code."

The case had a peculiar history in the lower Court, to which it is necessary to refer, as it must have had, in my opinion, a material bearing on the learned President's decision. The appellant was originally charged in Court on 24th February, 1950, under section 381 Penal Code. The charge read as follows :—

"That you between 1st February, 1950 and 22nd February, 1950 at Malacca, being a servant employed in the capacity of Settlement Public Relations Officer of the Malacca Public Relations Department committed theft by stealing property to wit a total of five gallons of petrol in the possession of the said Malacca Public Relations Department and thereby committed an offence punishable under section 381 of Cap. 45."

On the 19th April this charge was withdrawn, an acquittal being recorded, and the following three new charges substituted :—

"(1) That you between 15th May, 1949 and 23rd February, 1950 at Messrs. Guan Hoe & Co., Ltd. petrol pumping station, No. C, Fort Road, Malacca, dishonestly misappropriated to your own use certain movable property to wit petrol thus committing an offence punishable under section 403 of the Penal Code;

(2) That you between 2nd June, 1949 and 3rd February, 1950 at Malacca, cheated the Department of Public Relations of the Federation of Malaya by submitting various returns setting out that certain petrol had been used in Motor Vehicle No. B 5846 whereas it had been used in motor car No. BA 2910, with the knowledge that you were likely thereby to cause wrongful loss to a person to wit the aforesaid Department, whose interest in the transaction you were bound by law to protect thus committing an offence under section 418 of the Penal Code;

(3) That you between 15th May, 1949 and 23rd February, 1950 at Messrs. Guan Hoe & Co., Ltd. petrol pumping station at No. C, Fort Road, Malacca, abetted the offence of failing by Guan Hoe & Co., Ltd. to observe the first condition attached to a Retailer's Licence issued to him on the 18th October 1947 under the Fuel and Lubricants Control Proclamation No. 41, by requesting that company to deliver petrol into the tank of motor car No. BA 2910 whereas Authorisation Notes were presented with respect to motor vehicle No. B 5846, which offence was committed in consequence of the abetment, thus committing an offence under section 109 of the Penal Code and section 4 of the Fuel and Lubricants Control Proclamation, and punishable under section 19 of the aforesaid Proclamation."

After a prolonged hearing, in the course of which the third charge was amended, the prosecution closed their case on 20th June, and, on the resumption of the trial on 5th July, Mr. Jayaswal, counsel for the defence, submitted there was no case to meet on any of the charges. The learned President on this submission decided that each charge as framed was bad for multiplicity in that it contravened section 174 of the Criminal Procedure Code, and thereupon ordered that all three charges be struck out and that three charges under section 403 of the Penal Code, which he himself proceeded to draft, be substituted. I agree with the view of the learned President that the three charges he struck out were bad for multiplicity, and I think he was right to exercise his powers to amend the charges in the manner he did, but, while I sympathise with him in the difficult situation with which he was confronted, I think that, for reasons I shall proceed to state, the better course would have been for him not to have continued to hear the case himself, but to have directed a new trial under the provisions of section 170 Criminal Procedure Code.

The learned President who, it is clear from the record, took the greatest care throughout the proceedings, states in his grounds of judgment that he felt the accused was not prejudiced by the new charges. I regret that I am unable to agree with this conclusion. When the accused was called upon to answer the three charges on which he was eventually convicted he was entitled to have to meet only relevant and admissible evidence adduced by the Prosecution. These charges related to alleged offences on three dates in May 1949, and the prosecution evidence should have been confined to evidence directly proving the facts necessary to establish these offences and to any other evidence properly admissible under the Evidence Ordinance. Actually the accused was faced with a considerable body of evidence which, in my opinion, in the circumstances had become irrelevant and inadmissible. Particular instances are the statements of the fourth prosecution witness, Chiew Leong Chow, "I received this kind of chits from the accused four or five times in a month", and of the eighth prosecution witness, Koh Eng Wah, "I made false returns to Kuala Lumpur on instruction of the accused. I did that since May 1949 until February 1950." There could be no objection to those portions of the prosecution evidence which deal with the alleged instructions by the accused to the pump operators and other witnesses in preparation for, or in furtherance of, the commission of the offences, but since, if the physical acts of the accused directed towards the diversion of the petrol from the truck to his own car were established, there could be, in my view, no doubt that he did those acts with dishonest intention, it was not a case in which evidence of system was admissible, and, accordingly those portions of the evidence I have instanced, and others similar to it, were rendered irrelevant by the amendment of the charges at the close of the prosecution case. I feel that the effect of this evidence must be to tend to produce on the mind of anyone who heard it the impression that the accused had for a period of eight or nine months been systematically misappropriating petrol and cheating the Department of Public Relations. The accused may have done both of these things, but the existence of this evidence must have been prejudicial to him when the trial reached the stage where he was called

upon to answer three specific charges relating only to the month of May 1949.

Section 428 of the Criminal Procedure Code provides that no finding of a Court of competent jurisdiction shall be reversed on account of, *inter alia*, the improper admission of evidence unless such improper admission has occasioned a failure of justice. I considered in the circumstances whether there was evidence on which the learned President could properly have convicted, assuming he disregarded the evidence I considered had been rendered inadmissible under the amended charges. There are at least two features of the case which have led me to the conclusion it would be unsafe to uphold the convictions even reviewing the evidence on this basis. In the first place the learned President did not, apparently, consider the two pump operators, prosecution witnesses 4 and 7, accomplices. It seems to me that if the prosecution evidence is true they both knew well they were intentionally aiding the appellant to commit offences, and that, therefore, they were accomplices. In the second place each of these witnesses stated that *he* received Ex. P5 A, B, C,— documents which form the basis of the charges on which the appellant was convicted — from the accused, but there is nothing in the learned President's judgment to indicate that he had duly weighed the importance to be attached to this contradication on a most material point in reaching his decision. As it seemed to me the learned President had misdirected himself on the first of these matters, and that there was nothing to indicate he had adequately directed his mind to the second, I considered the convictions could not stand.

I decided not to order a re-trial in this case. In so deciding I was partly guided by the principle which has been stated by Murison, C.J. in the following terms: "I have grave doubt whether the power to order a re-trial is intended to be exercised in cases where the prosecution have, entirely through their own fault, failed to represent their case properly. If I complied with this petition it looks to me as if I should be ordering that an acquitted person should be tried a second time, only for this reason that the prosecution has not used all their available armoury in launching the first prosecution." (*vide Mallal's* Criminal Procedure Code 3rd Ed. p. 368). It is clear that these words are not entirely applicable to this case. The prosecution displayed great energy in using all their available armoury, but mismanaged it. Notwithstanding this situation I was prepared to consider a re-trial if it could be shown there was evidence which, properly admitted, I considered might warrant convictions, and before reaching my decision I invited the learned Deputy Public Prosecutor who argued the appeal to make any submissions he wished indicating the existence of such evidence. It appeared to me after hearing his submissions that it would not be the most equitable course to order a re-trial.

Appeal allowed.

LEO HOON HONG v. MUNICIPAL COMMISSIONERS OF THE TOWN AND FORT OF MALACCA.

[Orig. Civ. Juris. (Abbott, J.) November 13, 1950]

[Malacca — Originating Motion No. 9 of 1950]

Malacca (Municipal) Boarding Houses Byelaws, 1937, Byelaw 4 — Cancellation of licence.

This was an application for a writ of certiorari to quash a decision by the Municipal Commissioners of Malacca. The applicant held a licence issued under the Malacca (Municipal) Boarding Houses Byelaws, 1937, in respect of "The London Hotel". On the 7th of November, 1949, the applicant was convicted of an offence under Byelaw 6(iii) of the Byelaws in that he allowed certain rooms in the hotel to be used for immoral purposes. The Municipal Commissioners could have cancelled the licence forthwith but instead they appointed a sub-committee to hold an inquiry. The sub-committee made an inquiry and as a result of their report the Municipal Commissioners directed the cancellation of the licence.

Held, that there was nothing to show that the procedure adopted by the sub-committee or that of the Municipal Commissioners as a body when they considered the report of the sub-committee to suggest that it was in defiance of elementary standards of justice and that there was no ground for complaint by the applicant.

Case referred to :—

(1) *The Local Government Board v. Arlidge* (1915) A.C. 120 at pp. 137 and 138.

APPLICATION for writ of *certiorari*.

S. E. Bell for the applicant.

P. J. D. Regester for the respondents.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Abbott, J. : — This is an application for a writ of *certiorari* to quash a decision given by the respondents who are the Municipal Commissioners of the Town and Fort of Malacca.

The facts follow. From 1940 onwards the applicant held a licence, granted annually to him by the respondents under byelaw 3 of the Malacca (Municipal) Boarding Houses Byelaws, 1937, in respect of certain premises known as "The London Hotel". On the 30th of June, 1950, the respondents cancelled the licence in exercise of powers purporting to be vested in them